Coordination between the Forest Service and County Governments

The regulations pertaining to the U.S. Department of Agriculture's Forest Service's primary responsibilities to coordinate with counties can be found in the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA). Although some provisions in the Federal Land Policy and Management Act (FLPMA) apply to National Forest System lands, none require the Forest Service to coordinate with counties. The coordination requirement in FLPMA (43 U.S. Code 1721(c)(9)) applies to the Secretary of the Interior, not the Forest Service.

Under NFMA and its implementing regulations, the Forest Service is required to coordinate land management planning for the National Forest System (such as the amendment and revision of forest plans) with land management planning conducted by State and local governments. This coordination allows the Forest Service to take into account and consider the State or county's proposed management for lands under their jurisdiction, and vice versa.

Based on recent local government resolutions or ordinances and letters to some National Forests, it appears that some local government officials believe the NFMA coordination requirement means that the Forest Service must incorporate specific provisions of county ordinances into forest plans or that the Forest Service must obtain local government approval before making planning decisions. This position overstates the NFMA obligation of the Forest Service. The statute does not specify what actions are required to coordinate Forest Service planning with local government planning, and it does not in any way subordinate Federal authority to counties. Rather, the Forest Service must consider the objectives of State and local governments and Indian Tribes as expressed in their plans and policies, assess the interrelated impacts of these plans and policies, and determine how the forest plan should deal with the impacts identified.

The Council on Environmental Quality's (CEQ) NEPA regulation requires Federal agencies to cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and similar State and local requirements (40 Code of Federal Regulations (CFR) 1506.2). Where the requirements of both a State environmental policy act and NEPA can be fulfilled, the Forest Service may enter into joint environmental analysis processes with the States and counties. For example, when the Forest Service and the State or county are each preparing an environmental impact statement (EIS) for a proposal for which each entity must make a decision, the Forest Service may designate the State or county as a "joint lead agency" for the purpose of coordinating the preparation of a joint EIS that will be used by each agency in making its decision. Each joint lead agency retains its decision-making authority over the part of the proposed action over which it has authority, and one agency does not acquire influence over the other's decision-making.

Additionally under the CEQ's NEPA regulations, the Forest Service may designate a State or county as a "cooperating agency" to assist the Forest Service in preparing an EIS for a project on National Forest System lands (40 CFR 1501.6 and 1508.5). A cooperating agency may provide special expertise or assistance to the lead agency in analyzing the effects of the lead agency's proposed action. Cooperating agencies have jurisdiction by law or special expertise on environmental issues that should be addressed in the environmental analysis.

The Forest Service strives to identify, as early as practicable in the planning and environmental analysis process, any Federal, State, local, or Tribal government to participate in the NEPA process

as a cooperating agency. While a local government, by virtue of its cooperating agency designation, has no authority to impose specific provisions of county ordinances in forest plans or to require that the Forest Service comply with its procedural obligations, the county can provide its special expertise to the analysis regarding its concerns and can provide staff support to further the interdisciplinary nature of the NEPA process.

However, as to incorporating county ordinances into Forest Service management, under both the Property and Supremacy Clauses of the United States Constitution, as well as Forest Service land management statutes such as NFMA, the Organic Administration Act, and the Multiple-Use Sustained-Yield Act (MUSYA), and applicable case law, the Forest Service is not subject to either the substantive or procedural provisions of State and local law, ordinances, land management plans, or resolutions.

Q&As

1. **Question:** Is there a legal basis for granting a county's request for "coordinating status"?

   Answer: The term "coordinating status" is not used in existing authorities. Under NEPA and the CEQ regulations, a state or county/local government may be designated as a "joint lead agency" or "cooperating agency." (See Question 5.)

2. **Question:** Some local governments have asserted that the Federal Government needs state and local approval before taking actions that affect federal lands and resources. Does the Forest Service need approval from local agencies before taking actions, under federal authorities, that affect NFS lands?

   Answer: Under both the Property and Supremacy Clauses of the United States Constitution, Forest Service land management statutes, such as the Organic Administration Act, Multiple-Use Sustained-Yield Act (MUSYA) and National Forest Management Act (NFMA), and applicable case law, the Forest Service is not subject to either the substantive or procedural provisions of state and local law, ordinances, land management plans or resolutions.

   Discussion:
   The "Property Clause" of the Constitution provides that:
   Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. U.S. Const., art. IV, § 3, cl. 2.

   The Property Clause gives Congress the power to dispose of and make all needed regulations regarding federal lands. The Supreme Court has interpreted this provision to mean that the power over federal lands entrusted to Congress is without limitation. Under the Organic Administration Act, Congress delegated its authority under the Property Clause to the Forest Service with respect to NFS lands. The Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land and binds state courts, regardless of provisions to the contrary in state laws and constitutions.

   The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding. U.S. Const. , art. VI, cl. 2.

Congress has passed numerous laws that apply to NFS lands, such as the Organic Administration Act, MUSYA, and NFMA. Under the Supremacy Clause, state and local law is preempted or overridden to the extent it conflicts with these and other applicable federal laws or impedes accomplishment of the purposes and objectives of these and other applicable federal laws. Moreover, a state or local law that subjects the federal government to state or local requirements is presumptively invalid unless the state or local entity enacted it pursuant to a clear and express grant of congressional authority. Under these principles, local ordinances or resolutions that impose land management requirements on the Forest Service, such as a requirement to obtain local approval before acting or to comply with certain land mgmt. prescriptions, are preempted by the Forest Service's land management authorities and are presumptively invalid, as they are not supported by a clear and express grant of congressional authority.

3. **Question:** Are there any state or local requirements with which the Forest Service must comply?

Answer: The Forest Service must comply with state requirements that Congress expressly requires federal agencies to comply with such as those relating to the control and abatement water pollution under the Clean Water Act and the control and abatement of air pollution under the Clean Air Act. Additionally, the Forest Service must comply with state requirements that do not conflict with federal laws.

4. **Question:** Does the Federal Land and Policy Management Act (FLPMA) require the Forest Service to coordinate with states and local agencies?

Answer: FLPMA primarily governs the management of public land by the Bureau of Land Management. Although some provisions in FLPMA apply to National Forest System lands, no FLPMA provision requires the Forest Service to coordinate with local agencies.

Discussion:
Some local government officials refer to a provision in Federal Land Policy and Management Act (43 U.S.C. §1712(c)(9)) to support their theory that they have authority to impose land management requirements on the Forest Service. This provision states in part:

In the development and revision of land use plans, the *Secretary shall, to the extent consistent with the laws governing the administration of the public lands, coordinate* the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located.... Land use plans of the Secretary under this section shall be consistent with State and

local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act. *(Emphasis added.)*

The Secretary referred to in this section is the Secretary of the Interior, not the Secretary of Agriculture, and this provision governs the Bureau of Land Management, not the Forest Service. Even assuming this provision applied to the Forest Service, the provision would not establish the supremacy or co-equal status of state law and county ordinances relative to federal law. The provision merely requires that BLM:

(1) coordinate land use inventory, planning, and management activities for the public lands with the planning and management programs of state and local governments where those lands are located; and

(2) make their land management plans consistent with state and local plans to the extent consistent with federal law and the purposes of FLPMA. This provision provides no legal authority for enforcement of state law or local ordinances and resolutions regarding management of NFS lands or even federal public lands managed by BLM.

5. Question: What are the Forest Service's legal responsibilities to coordinate specifically with state and local governments under the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations?

Answer: The Forest Service is required to seek comment from state or local agencies on a draft environmental impact statement (DEIS) when the agencies are authorized to develop and enforce environmental standards. 40 CFR 1503.1(a)(2)(i). The Forest Service must cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements. 40 CFR 1506.2. When the Forest Service and the state or county each is preparing an environmental impact statement (EIS), the Forest Service may designate the state or county as a joint lead agency. 40 CFR 1501.5(b) and 1508.5. The Forest Service also may give cooperating agency status to a state or local agency, whose role would be to assist the Forest Service in preparing an EIS. 40 CFR 1501.6 and 1508.5.

Discussion:
NEPA and the CEQ regulations contain several specific provisions regarding state and local governments.

- **Seeking Comments on DEIS**
  In certain situations, the Forest Service must request the comment of state and local agencies after preparing a draft environmental impact statement (DEIS). Specifically, the CEQ regulations (40 CFR 1503.1(a)(2)(i)) provide:

  a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:
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  (2) Request the comments of:
  (i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

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This provision would apply, for example, to situations where the state's requirements under the Clean Water Act or Clean Air Act apply.

- **Joint Lead Agency Status**
  The Forest Service may enter into joint environmental analysis processes with the states in situations where the requirements of both state environmental policy act and NEPA can be fulfilled. In these situations, the Forest Service and the state or local agencies may be joint lead agencies for the purpose of coordinating the preparation of a joint EIS when the state or local agency also is making a decision.

  The CEQ regulations (40 CFR 1506.2(c)) provide:
  (c) Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more federal agencies and one or more state or local agencies shall be joint lead agencies. Where state laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, federal agencies shall cooperate in fulfilling these requirements as well as those of federal laws so that one document will comply with all applicable laws.

  The CEQ regulations (40 CFR 1508.5) define the term "lead agency" to mean:
  Lead agency **means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.**

  A state or local agency may be designated as a "joint lead agency" as described in the CEQ regulations (40 CFR 1501.5(b)):
  (b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (1506.2).

  Each joint lead agency retains its decisionmaking authority over the part of the proposed action over which it has authority.

- **Cooperative Agency Status**
  Cooperating agencies have jurisdiction by law or special expertise on environmental issues that should be addressed in the environmental analysis. State and local agencies, as well as other federal agencies, may be cooperating agencies. Specifically, a cooperating agency is defined in the CEQ regulations (40 CFR 1508.5) to mean:

  Cooperating agency **means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or**

other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.
When the Forest Service is the lead agency preparing an environmental analysis, it may identify and solicit, as appropriate, potential cooperating agencies under the CEQ regulations (40 CFR 1501.6) which provide:

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement, may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

Forest Service officials should identify as early as practicable in the planning and environmental analysis process any state and local government cooperating agencies. However, designation of a state or local government as a cooperating agency does not operate to deprive the Forest Service of its decisionmaking authority. A state or local government by virtue of its cooperating agency status has no authority to impose specific provisions of county ordinances in forest plans or to require that the Forest Service comply with its procedural obligations.

In 2002, the Council on Environmental Quality (CEQ) issued a guidance memorandum to the heads of all federal agencies encouraging them to invite other federal, state and local governments, and tribes to participate in the NEPA process as cooperating agencies. See *http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesmemorandum.html* and *http://ceq.hss.doe.gov/nepa/regs/Attach2FAQsDec04.pdf*.

The guidance provides:

Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decision-making authority of any agency involved in the NEPA process. This memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

Even before this guidance was issued, CEQ had encouraged federal agencies and the Forest Service to designate non-federal agencies as cooperating agencies. (See July 28, 1999, Memorandum from CEQ to federal agencies; and September 14, 1998, direction from Deputy Chief Robert C. Joslin to Regional Foresters and others.)